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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WALTON MANUFACTURING COMPANY AND LOGANVILLE PANTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered on January 6, 1961, insofar as it denies enforcement of an order issued by the Board against Walton Manufacturing Company and Loganville Pants Company (R. 252–264).[1]

OPINIONS BELOW

The opinion of the court of appeals (*infra*, pp. 19–35) is reported at 286 F. 2d 16. The findings of fact, conclusions of law, and order of the Board (R. 57–161, 252–264) are reported at 124 NLRB 1331.

[1] "R." refers to the transcript of record; "B.A." refers to the appendix to the brief filed by the Board in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1961 (*infra,* p. 36). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below, by setting aside the Board's findings that employees had been discharged for union activity, "grossly misapplied" the standard of review laid down in *Universal Camera Corp* v. *National Labor Relations Board,* 340 U.S. 474, 488, by "displac[ing] the Board's choice between two fairly conflicting views."

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objec-

tion that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

A. THE BOARD'S FINDINGS, CONCLUSIONS AND ORDER

In November, 1957, the Amalgamated Clothing Workers of America, AFL–CIO, herein called the Union, initiated a campaign to organize the respondent's employees.[2] The respondent countered this campaign with threats to discharge union adherents, surveillance of a union organizer, interrogation of employees as to their own union activity and that of fellow employees, and promises of benefits designed to deter the employees from the exercise of their statutory rights (R. 65–68, 73–74, 76–77; B.A. 19–27, 37, 75, 86, 194–196, 207–210). The Trial Examiner, the Board, and the court below all agreed that the respondent by this anti-union campaign engaged in unlawful interference, restraint, and coercion of employees. In addition, the respondent discharged

[2] The respondents Walton Manufacturing Company and Loganville Pants Company, Georgia corporations, herein jointly called "the Company" or the respondent, are respectively the coat division and the pants division of a commonly-owned enterprise which manufactures men's and boy's clothing (R. 61–62; B.A. 189–190). For all purposes herein Walton and Loganville may be considered as a single entity.

a number of employees under the following circumstances.

On December 4, 1957, the respondent discharged employee Lucille Yancey. According to Mrs. Yancey's testimony, accepted by the Trial Examiner and the Board, within a day thereafter she had two conversations with Morris Scharff, the respondent's principal managerial officer, relating to her discharge (R. 84; B.A. 62–64). During both of these conversations she asked Scharff the reason she was discharged. The first time he told her it was for bad work, but when she asked him the second time, he replied by handing her a union paper (R. 84; B.A. 64). Her testimony continues, "So I told him, I said, 'Morris that's another reason you're laying me off.' And he said, 'Well, Lucille, I tell you, I've heard that you and your husband have been working with the union organizers'" (*ibid.*). Scharff added, according to Yancey, that if the Union did not succeed in organizing the plant, he would rehire her (R. 85; B.A. 65–66). Yancey's testimony was not contradicted by any credited evidence (R. 97).[3]

On January 10, 1958, the respondent discharged Grace McCart. On January 14, McCart went to Scharff to find out why she had been discharged and to seek reinstatement. During their conversation she told Scharff that she believed she had been discharged because of her union activities (R. 100; B.A. 85–86). Scharff did not deny her statement, but, instead,

[3] Scharff's denial that he made the statements attributed to him by Yancey was specifically discredited (R. 97).

interrogated her regarding the union meeting she had attended the night before her discharge and asked her to name those employees who had accompanied her to the meeting (R. 100; B.A. 85–86). McCart conceded her attendance at the meeting but refused to name any other employees who had attended (R. 100; B.A. 86). Scharff then asserted that it did not matter as he knew who was at the meeting and proceeded to name employees Pearl Coker and Ruth Brooks, whom he characterized as "heavily pro-union and active in the organizing attempt" (R. 100; B.A. 87). Scharff refused to reinstate McCart.

The day following Scharff's interrogation of McCart, the respondent discharged Pearl Coker (R. 103; B.A. 70). The next day, Ruth Brooks was dismissed (R. 108; B.A. 117). At the time of her discharge, Brooks told her supervisor, a Mr. Hughley, that she was being discharged because of her union activity (R. 109; B.A. 120). Hughley did not deny Brooks' accusation, but instead replied, "Well you girls are paying too much attention to this guy from the North [the Union organizer] giving you the piece rates on your job, and we cannot afford those rates that they pay up there" (R. 109; B.A. 121).

Following Brooks' discharge, in an apparent effort to protect the remaining pro-union employees, the Union wrote Scharff, listing 12 employees whom the letter identified as members of the union's volunteer organizing committee, and stating that they had been informed of their rights under the Act to engage in self-organization (R. 113; B.A. 205–206). Scharff

immediately interrogated every employee named in the letter who was present and working in the coat plant (R. 114; B.A. 32, 37–38, 75–76, 93, 99, 107–108, 122, 131). In each case he asked the employee if she had authorized the union to use her name (*ibid.*). When the employee answered in the affirmative, Scharff placed a check mark beside her name (*ibid.*). In some cases Scharff asked the employee if she would withdraw her name from the letter, and threatened reprisal for refusal. Employee Ida Harper testified that Scharff "* * * asked me if I wanted to stay on there and I told him, 'Yes.' He said, 'You know what this leads up to.' And put a check mark by my name and walked out." (R. 138; B.A. 99). Pauline McGee testified that after she acknowledged she had permitted the union to use her name on the letter Scharff said to her, "Do you know what this means?" "and I said 'Yes sir,' and he said 'Well, all right then'" (R. 144; B.A. 131). When Frances Powell admitted consenting to the Union's use of her name, Scharff said, "Well, if that's the way you want it" (R. 134; B.A. 32). Evelyn Hudson testified that when Scharff showed her the letter he stated, " 'Do you realize Evelyn, that this could work a hardship on you?' And I told him, 'Yes,' that I did. And he * * * 'Do you want to leave your name on this letter?' I told him, 'Yes.' And he * * * put a check mark by my name and walked away" (R. 126; B.A. 131). Scharff then posted the letter with the check marks on the Company bulletin board (R. 114; B.A. 130–132, 205). A few days later, Harper, McGee, Powell, Hudson and five other em-

ployees named in the letter were "permanently laid off" (R. 115).

Upon consideration of the foregoing facts the Board, in agreement with the Trial Examiner, concluded that the respondent had not only interfered with, restrained and coerced employees in their right to engage in concerted activity for the purpose of self-organization, but that the respondent had also discharged Yancey, McCart, Coker and Brooks, and laid off nine other employees to discourage membership in the Union (R. 252). Accordingly, the Board ordered the respondent to cease and desist from the unfair labor practices found; to reinstate and make whole those employees whom the respondent had discriminated against and to post appropriate notices (R. 261–264).

B. THE HOLDING OF THE COURT BELOW

The court below, while sustaining the Board's findings of interference, coercion and restraint, and enforcing the order of the Board in respect to those violations, determined that the Board's findings that the discharges and layoffs were motivated by discrimination against union activity lacked the requisite support in the record. The court, therefore, refused enforcement of the Board's order as it related to those violations (pp. 19–35, *infra*).

REASONS FOR GRANTING THE WRIT

In *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488, this Court stated that a reviewing court may not "displace the Board's

choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" The court below ignored that admonition here. In an isolated case this alone would not have prompted us to invoke the power of this Court.[4] However, the present decision is the most recent in a series of Fifth Circuit cases showing that it is the normal practice of that court to overturn Board findings of discrimination which would be sustained in the other circuits. Accordingly, this Court's corrective action is required in order to secure uniform administration of the national labor policy.

1. In determining whether a discharge is for union activities or for cause, the problem is to ascertain the employer's motive. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46; *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 43–44. Since direct evidence of a purpose to violate the Act is rarely obtainable, proof of motive usually entails the weighing of conflicting inferences. Thus, experience shows that employers hostile to unions are likely to take steps, including discharge, to prevent the union from gaining a foothold. On the other hand, it is also true that, when an employee is inefficient or insubordinate, he will often be discharged for that reason. Accordingly, when a record reveals

[4] It may be noted, however, that as recently as June, 1959, this Court, in a bargaining case which was before it on a procedural point, had occasion to remind the court below of the *Universal Camera* admonition. *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 309, n. 10.

both the employer's hostility to unions and cause apart from the union for a discharge, it becomes necessary to decide which inference is the stronger in the light of all the facts—whether the anti-union animus or the employee's deficiency prompted the employer's action.

Congress entrusted to the Board the task of weighing the conflicting inferences. Congress also provided that the Board's resolution should be accepted by the reviewing court if the Board's choice is reasonable, even though the court would have "made a different choice had the matter been before it *de novo.*" *Universal Camera, supra.*

The Fifth Circuit, since the early days of the Wagner Act, has had difficulty in applying this principle. In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 207–209, this Court reversed the Fifth Circuit for setting aside Board findings of fact, pointing out that it had exceeded its reviewing power under the Act. Shortly thereafter, in *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 438, the Fifth Circuit nevertheless suggested that discriminatory discharge cases, which entail a back pay remedy, require a higher standard of proof than cases involving employer interference with union activity, where the only sanction is a cease and desist order. In an oft-repeated statement (see p. 34, *infra*), the court declared that, in such cases, if the employer "says it was not union membership or activity, but something else which in fact existed as a ground," there "must be impeachment of him, or substantial contradiction, or if cir-

cumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point" (122 F. 2d at 439). In other words, the Fifth Circuit held that if it could be inferred that the employee was discharged for cause, the Board may not draw the inference that the discharge was for union activity, even though the latter inference was reasonable, and the Board had judged it stronger under the circumstances. The precedent cited for this proposition[5] showed that the court was denying the Board power to find adversely to the employer upon evidence supporting either of two inconsistent inferences.

In *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, this Court, in reversing the Tenth Circuit, made plain that the view expressed in *Tex-O-Kan* was erroneous. "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them * * *." Since then, all of the circuits but the Fifth have generally conformed to the *Nevada Consolidated* rule, which, as *Universal Camera* recognizes, was not changed by the 1947 amendments. See *National Labor Relations Board* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8); *Sunshine Biscuits, Inc.* v. *National Labor Relations Board*, 274 F. 2d 738, 741–742 (C.A. 7).

Nevertheless the Fifth Circuit adhered to its former practice. Through 1955, the court was still

[5] *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U.S. 333.

expressing the view that, if it found the inference of a discharge for cause as reasonable as the contrary inference, the Board's finding of discriminatory motive should be set aside. See *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 853–854; *National Labor Relations Board* v. *Huber & Huber Motor Express, Inc.*, 223 F. 2d 748, 749; *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 229 F. 2d 816, 819. Although the court subsequently corrected its formulation of the governing principle (see *National Labor Relations Board* v. *Coats & Clark, Inc.*, 231 F. 2d 567, 572), it has continued to apply the old rule in practice. Examination of its decisions in discriminatory discharge cases reveals that the Fifth Circuit's practice is to overturn the Board's findings of unlawful motivation if the employer can point to some incident or shortcoming on the part of the employee which *might* have been the cause for the discharge.[6] And the Fifth Circuit appears to follow this course without regard to the strength of the inference of anti-union discrimination to be derived from admissions, the employer's knowledge of the employee's union activities and the proof of other unfair labor practices.

2. The present case illustrates both the character of the inquiry which the Board must make under Sec-

[6] This may be illustrated by the following cases during the last two years: *National Labor Relations Board* v. *Hudson Pulp & Paper Corp.*, 273 F. 2d 660 (C.A. 5); *National Labor Relations Board* v. *Ingram*, 273 F. 2d 670 (C.A. 5); *National Labor Relations Board* v. *Allure Shoe Corp.*, 277 F. 2d 231 (C.A. 5); *National Labor Relations Board* v. *Cosco Products Co.*, 280 F. 2d 905 (C.A. 5); *National Labor Relations Board* v. *Reducing Carriers, Inc.*, 284 F. 2d 397 (C.A. 5).

tion 8(a)(3) and the essential error of the court below. Lucille Yancey, who was discharged by respondent, testified that Scharff, one of the respondent's officials, had admitted that the assistance which she gave to union organizers was the cause of her discharge and that her reinstatement depended upon the failure of the effort to organize (R. 97–98). There was a mass of evidence that the respondent not only was hostile to the union but that it had not hesitated to give effect to its hostility by engaging in extensive anti-union conduct in violation of Section 8(a)(1). Other employees active in support of the union were proved to have been discharged or laid off. Certainly these facts support an inference that Mrs. Yancey was discharged because of her union activities. There was also testimony to the effect that Mrs. Yancey's work was poor. No doubt this information would support an inference that Mrs. Yancey's unsatisfactory work was the cause for her discharge, although it also appeared that she had never been criticized before and that her production was not unsatisfactory (R. 83–84, 92; B.A. 59–60, 211).[7] The Board, after weighing all the evidence, found that the former inference was the stronger. Since both views were reasonable in the light of all the evidence, the choice was for the Board,

[7] The court relied on evidence showing that Mrs. Yancey was not, in fact, an active union adherent (*infra*, p. 28). This fact, if true, would be irrelevant in the light of the evidence that the respondent believed she was "working with the union organizers" (*supra*, p. 5). See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 589–590; *National Labor Relations Board* v. *Ridge Tool Co.*, 211 F. 2d 88 (C.A. 6), enforcing 102 NLRB 512, 513.

and a proper application of the standard of judicial review established by the *Universal Camera* case would have led to affirmance of its finding and enforcement of its order. Nevertheless, the court below held that the proof of poor performance was decisive and reversed the Board.

The action of the court in setting aside the Board's findings of unlawful discrimination in the other discharges followed the same pattern. In each case the court chose to rely on selected evidence that the individual was responsible for "poor workmanship," was a "sub-marginal producer," or was "unable to make production." Although such evidence might have justified a decision by the Board that unlawful discrimination was not involved, the Board had rendered its decision on the basis of evidence which it believed more convincing, as follows:

(a) Evidence that Grace McCart was discharged the day after she signed a union card; that, when she accused Scharff of discharging her for that reason, he did not deny it but proceeded to interrogate her concerning her union activities and those of other employees (R. 99–100); and that she had never been criticized about her work, had successfully met the production quota prior to her discharge, and was indeed rehired to perform the same work after the Company had defeated the Union (R. 99-102; B.A. 84).

(b) Evidence with respect to the discharge of Pearl Coker that Scharff admitted that, in his interrogation of Mrs. McCart, he had named Mrs. Coker as one of those employees he knew to be "heavily pro-union and active in the organizing attempt"; that Mrs.

Coker was discharged the next day with the explanation that, though her work was "nice," she was not earning enough (R. 103, 107); and that an employee whose production was lower than Mrs. Coker's was retained while she was precipitously fired in the middle of the work week without advance warning (R. 104–105; B.A. 42).

(c) With respect to Ruth Brooks, evidence that she, like Mrs. Coker, was described by Scharff as "heavily pro-union and active in the organizing attempt" (R. 109, 112); that, when she told her supervisor that she was being discharged because of union activities, he did not deny it, but replied that the "girls were paying too much attention" to the promises of the union organizer (R. 109); and that she had been regarded as a good operator and her production was equal to that of others in her section (R. 109, 111).

The finding of discrimination with respect to nine of the employees named in the union letter who were "permanently laid off" rested on the circumstances that the layoffs occurred after the respondent verified that they were on the union committee, attempted unsuccessfully to persuade them to withdraw, and delivered thinly veiled warnings of the consequences if they did not (*supra*, pp. 6–7). The court, however, chose to rely on the "plausible and reasonable grounds" assigned by the management even though the Board found that this evidence did not stand up under scrutiny (R. 117–119, 121–122, 125–127, 128–129, 131–132, 134–137, 138–139, 144–147, 149–150).

On the basis of the foregoing, the Board's inference that four employees were discharged and nine

laid off because of their union activity, rather than for cause as asserted by the respondent, was clearly reasonable. Under *Universal Camera*, the court below was therefore required to sustain the Board's findings, and its action in redetermining the matter *de novo* involved a gross misapplication of the standard of review expressed therein.

3. As stated above, the instant case is fairly representative of the basic error in the rules of decision developed by the court below for applying the standard of judicial review established in the *Universal Camera* case. The basic error is that that court does not simply inquire whether the Board's findings are supported by substantial evidence on the record considered as a whole; instead, it has set up a special subordinate rule calling for a more critical evaluation of the findings in discriminatory discharge cases—a rule which denies the Board power to choose between two fairly conflicting views. This is made clear by the concluding portions of the opinion in the instant case where the court below quotes at length from the *Tex-O-Kan* case, *supra*, to show that a special burden rests upon the Board whenever the employer assigns a specific reason for a discharge (p. 34, *infra*).[8]

The extent of the disparity between the Fifth Circuit and other courts of appeals in applying the substantial evidence reviewing standard is further revealed by these statistics: A survey published in the American Bar Association Journal, in 1958, shows

[8] See also, *National Labor Relations Board* v. *Ingram*, 273 F. 2d 670, 673 (C.A. 5).

that the Fifth Circuit sustained administrative findings in only 45 percent of the cases before it, while the other ten circuits did so in 72 percent of the cases before them." Similarly, Board statistics prepared for the fiscal year 1960 show that the courts other than the Fifth Circuit denied enforcement or substantially modified the Board's order in 42 cases, and of these only 11, or 26.2 percent, were refused enforcement on an issue of fact. In the Fifth Circuit, on the other hand, the court denied enforcement or substantially modified the Board's order in 12 cases, and of these 10, or 83.3 percent, were refused enforcement solely on an issue of fact.

This wide discrepancy between the Fifth Circuit and the other courts of appeals respecting the scope of review of Board findings must be removed by this Court if the statutory guarantees are to have the same meaning for employees in all parts of the nation.[10] In short, we submit that, as in *National*

[9] Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945, 948 (1958). See also, Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1029 (1956).

[10] The discrepancy in standard of review is not confined to discriminatory discharge cases. Contrast, for example, the standard applied by the court below and by other circuits in reviewing Board findings that bargaining was not in good faith. With *White* v. *National Labor Relations Board*, 255 F. 2d 564 (C.A. 5) (and see dissent at 570-573), and *National Labor Relations Board* v. *Cummer-Graham Co.*, 279 F. 2d 757 (C.A. 5), contrast *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1), certiorari denied, 346 U.S. 887; *National Labor Relations Board* v. *Century Cement Co.*, 208 F. 2d 84, 85-86 (C.A. 2); *Wheatland Elec. Coop.* v. *National Labor Relations Board*, 208 F. 2d 878, 882 (C.A. 10), certiorari denied, 347 U.S. 966.

Labor Relations Board v. *Waterman Steamship Corp.*, 309 U.S. 206, 208–209, "the present [is] one of a series of decisions" in which the court below has failed to give effect to the provisions of Section 10(e) of the Act, and that the Board's "duly conferred jurisdiction has been invaded so that [its] statutory duties cannot be effectively fulfilled * * *" Review by this Court is thus warranted.[11]

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1961.

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[11] The Fifth Circuit's intrusion into the Board's fact-finding function is further revealed by the recent decision in *National Labor Relations Board* v. *Florida Citrus Canners Co-Operative* (C.A. 5), March 27, 1961, where the court undertook to reweigh and set aside the Board's determination of the credibility of witnesses even though reasonable.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18198

NATIONAL LABOR RELATIONS BOARD, PETITIONER, *versus* WALTON MANUFACTURING COMPANY AND LOGANVILLE PANTS COMPANY, RESPONDENTS

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D.C.

(January 6, 1961.)

Before JONES, *Circuit Judge*, and HOOPER and JOHNSON, *District Judges*.

JONES, Circuit Judge: The National Labor Relations Board, by this proceeding, seeks enforcement of its order against the Respondents, Walton Manufacturing Company and Loganville Pants Company. The Board found that the Respondents interfered with, restrained and coerced their employees by surveillance of union activities, threatening reprisals for union adherence and interrogating employees concerning union affairs. The Board's order directs that the Respondents cease and desist from engaging in these practices. The Board found that the Respondents had discharged four employees and terminated the employment of nine others because of their union activities. The Board's order directs that employment be offered to such of these discharged and termi-

nated employees as had not been rehired and that all of them be made whole for any loss of earnings sustained by reason of their having been discharged or having had their employment terminated. The conventional provisions for making Respondents' records available to the Board, and for the posting of notices were included in the order. The Board states that the only question for our consideration is whether there is substantial evidence on the record as a whole to support the Board's findings. This is certainly important and may be controlling.

As we must do in these "substantial evidence" cases, we have undertaken the tedious task of reading the record and reviewing the evidence; tedious because of the necessity of going from the Board's appendix to the employer's appendix, and so back and forth from one to the other, in an effort to piece together the isolated excerpts of testimony which each party has extracted for the purpose of supporting the position for which it contends. The Board incorporates into its appendix nineteen separate quotations from the testimony of the witness, Morris Scharff, and the employer includes thirty-seven selections from the testimony of this witness. The same is also true, to a lesser degree, with respect to the testimony of twenty-five or more of the other witnesses. Our decision is to be based upon the record considered as a whole. Parts of the record, taken out of context, are not to be considered piecemeal, but we are to consider the record in its entirety and as a unit. This we have attempted to do.

The Board found that the Respondents interfered with, restrained and coerced their employees in violation of Section 8(a)(1) of the Act.[2] The personnel

[2] 29 U.S.C.A. § 158(a)(1).

matters of the Respondents were entrusted to Morris Scharff. That he was possessed of an anti-union bias is well established, and the Respondents are not to be penalized because of his beliefs. *N.L.R.B.* v. *McGahey*, 5th Cir. 1956, 233 F. 2d 406. Nor will the absence of affection of the union management for Scharff, which was also demonstrated, result in any benefit to the Respondents. Morris Scharff made talks to the employees during the period when the union was attempting to organize the Respondents' plants. He related some of his unpleasant experiences with the union during the time he was operating a plant in New York. In the brief of the Board it is stated that "Scharff told the employees, in effect, that he would shut down the plant rather than deal with the union." Although some of the witnesses for the Board's General Counsel testified that Scharff had made such statements, the Examiner became satisfied that the tape recordings, providentially made, and written transcriptions of them, were "substantially accurate reproductions of what was said. * * * " The examiner concluded that the statements of Morris Scharff were, to use the phrase in the Examiner's report, "protected free speech," with the exception of the conclusion of the speech[3] in which Scharff said:

> * * * remember I have no association with this Company, officially. I hope to have in the near future, but if you want a union shop, you are going to have it without me, because I have had my stomach full of unions, because I can't take orders from New York. I can't take an order to be unfair to one person or another. I will have no part of it.

[3] Morris Scharff made several speeches, all from the same notes and all of substantially the same content.

Upon the above quoted statement the Examiner finds that Scharff had threatened to close the plant rather than deal with the union. Although the father and brother of Morris Scharff were officers, directors and stockholders of the Respondents, Morris Scharff himself was neither officer, director nor stockholder. We find no basis for an inference of a threat to close the plant in the statement of Scharff that if the employees have a union shop they will have it without him, and that he will have no part of it. Notwithstanding the extent to which Morris Scharff may have exercised the functions of management, or have been regarded by the employees as the boss, that which he said cannot fairly be interpreted to mean something so different as the meaning which the Examiner has found. Some of the employees gave categorical testimony that Scharff's speeches did contain direct statements that he would close the plant rather than deal with the union. The Examiner concludes that this testimony was the interpretation of Scharff's quoted remarks, and the Examiner says that the employees did reasonably interpret the remarks as a threat to close the plant. If it be suggested that, instead of making reasonable interpretations, these employees merely demonstrated that they had faulty memories, and their statements as to other matters were to be regarded with suspicion, the answer to such a suggestion would be that credibility is a matter entrusted to the Examiner and the Board and they have fully credited the testimony of the employees and have found Morris Scharff unworthy of belief.

Although there was not any evidence, substantial or otherwise, to support the finding that Morris Scharff, in his talks to employee groups, threatened to close the plants, we cannot say the same with respect to other findings of interference, restraint and

coercion. A letter was sent to employees outlining the Respondents' policy as to life insurance, hospital and medical insurance, paid vacations and overtime. Hope of inaugurating a pension plan was declared. The letter stated:

> We are happy that no employee has to pay dues or initiation fees to any outside union to work at these plants. You will not be forced to make payments to outsiders for the privilege of working here. What earnings you make here are yours. No part goes to organizers.

A union organizer was followed as he called upon Respondents' employees at their homes. Direct as well as veiled threats of discharge for joining the union were made by a supervisor to employees. There was interrogation by supervisors of employees as to their activity and that of others with respect to the union. The testimony as to some of these matters was controverted. The resolving of evidentiary conflicts is within the province of the Board. Some of the conduct of the Respondents which the Board has condemned might, if isolated from the other facts shown, be regarded as not being in violation of the prohibitions against interference, restraint and coercion. We cannot say that the totality of the evidence, the substantial evidence on the record as a whole, fails to support the Board's finding of interference, restraint and coercion. The "cease and desist" portion of the Board's order, modified as hereinafter provided, will be enforced.

Among other things, the Board's order provides that the Respondents shall cease and desist from:

> Discouraging membership in and activities on behalf of Amalgamated Clothing Workers of America, AFL–CIO, or in any other labor organization of its employees, by *discharging*

> *or refusing to reinstate any of its employees, or in any other manner* discriminating in regard to their hire or tenure of employment, or any other term or condition of employment. [Italics supplied.]

Since, as is hereinafter set out, it is determined that substantial evidence is lacking for the Board's findings that the Respondents discriminatorily discharged and refused to rehire employees because of their union activity, we reach the conclusion that the italicized portion of the order, as quoted above, should be omitted.

The Board's order also directed the Respondents to cease and desist from:

> Following or otherwise engaging in surveillance of union organizers, or *creating the impression of* engaging in surveillance of union meetings; threatening employees with discharge, shutdown of the plant or with other economic sanctions to discourage union affiliation or adherence; coercively or otherwise unlawfully interrogating employees regarding their union membership or activities; conditioning the reemployment of laid off employees upon a union not becoming the representative of the employees; or in any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organizations, to join or assist Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act and to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor

> organization as a condition of employment as authorized in Section 8(a)(3) of the Act. [Italics supplied.]

If the Respondents are required to refrain from engaging in surveillance of union meetings the purpose of the Act will be served without imposing upon them a duty to avoid creating an impression. "Impression" is an equivocal term, it is "an indistinct or indefinite notion, remembrance, belief or opinion." *Paramount Film Distributing Corporation* v. *City of Chicago*, D.C.N.D.Ill 1959, 172 F. Supp. 69. Unlawful interference may be found from inferences based on facts disclosed by evidence, but not upon impressions made upon the employees, unless made by acts or words of the employer, and then it is the acts or words that are violative of the law. The italicized words in that portion of the order last quoted above should be deleted.

During the period between December 4, 1957, and January 16, 1958, the Respondents discharged four employees, Lucille Yancey, Grace McCart, Pearl Coker, and Ruth Brooks. The Board found that they were discharged for union activity, in violation of Section 8(a)(3) and (1) of the Act. Reinstatement of those who had not been rehired, and payment of lost earnings were ordered. We are again confronted with the difficult task of determining whether the motive for the discharge of employees is a proper one or whether it was prompted by the activity of the employees on behalf of a union. Cf. *N.L.R.B.* v. *Redwing Carriers, Inc.*, 5th Cir. 1960, -- F. 2d —. The requirements of substantiality of evidence and reasonableness of the inferences to be drawn from the evidence are not less in a case of reinstatement and reimbursement than where a cease and desist order is directed against interference. See *N.L.R.B.*

v. *Ingram*, 5th Cir. 1960, — F. 2d —; *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co.*, 5th Cir. 1941, 122 F. 2d 433. In the determination of whether there is substantial evidence and whether inferences are justified, a closer scrutiny of the record than might otherwise be required becomes necessary where, as here, questionable inferences have been drawn and where, as here, the Examiner has uniformly credited all of the General Counsel's evidence and generally disbelieved all of the employer's evidence. *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 5th Cir. 1955, 222 F. 2d 341, Cf. *N.L.R.B.* v. *Cosco Products Co.*, 5th Cir. 1960, 280 F. 2d 905.

We are aware of the requirement that we are not to overturn the Board's findings if supported by substantial evidence on the record as a whole. We recognize the principle that the substantial evidence rule applies to the choice of inferences as well as to the finding of facts as facts. *N.L.R.B.* v. *Birmingham Publishing Co.*, 5th Cir. 1958, 262 F. 2d 2. We do not question the settled doctrine that the Court should not, as a general proposition, disturb the action of the Examiner and the Board in crediting or discrediting the testimony of a witness. *N.L.R.B.* v. *West Point Manufacturing Co.*, 5th Cir. 1957, 245 F. 2d 783; *N.L.R.B.* v. *Newton Co.*, 5th Cir. 1956, 236 F. 2d 438. It is not, however, required that the Examiner's findings be given more weight than reason would dictate and, in the light of judicial experience, they deserve. *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. This Court has had frequent occasion to announce and develop the doctrine that if it appears that there is substantial evidence on the record as a whole to make the inferences of legal and illegal discharge reasonably equal, we may not overturn the Board's finding

of an illegal discharge. *N.L.R.B.* v. *Dan River Mills, Inc.*, 5th Cir. 1960, 274 F. 2d 381, *N.L.R.B.* v. *Fox Manufacturing Co.*, 5th Cir. 1956, 238 F. 2d 211; *N.L.R.B.* v. *Newton Co.*, 5th Cir. 1956, 236 F. 2d 438; *N.L.R.B.* v. *McGahey*, 5th Cir. 1956, 233 F. 2d 406; *N.L.R.B.* v. *Coats & Clark, Inc.*, 5th Cir. 1956, 231 F. 2d 567; *N.L.R.B.* v. *Houston Chronicle Publishing Co.*, 5th Cir. 1954, 211 F. 2d 848. The clarification of this rule, as stated in the Houston Chronicle case, by the opinion in Coats & Clark, has not modified the principle that an unlawful motive is not lightly to be inferred. *N.L.R.B.* v. *Dan River Mills, Inc., supra; N.L.R.B.* v. *Hudson Pulp & Paper Corporation*, 5th Cir. 1960, 273 F. 2d 660; *N.L.R.B.* v. *Fox Manufacturing Co., supra.*

The burden of proof rests upon the Board's General Counsel to establish by acceptable substantial evidence on the record as a whole that discharges came from the forbidden motive of interference in the exercise of the statutory rights of the employees. *N.L.R.B.* v. *Winter Garden Citrus Products Cooperative*, 5th Cir. 1958, 260 F. 2d 913, and cases there cited. See also *N.L.R.B.* v. *Birmingham Publishing Co., supra*, and cases there cited, and *N.L.R.B.* v. *Redwing Carriers, Inc., supra.* Whenever the General Counsel's burden is not carried, and whenever the inferences of fact are not reasonably permitted by the substantial evidence, it is the duty of the reviewing court to displace the Board's finding of unlawful motive.

There was much evidence for the Respondents that the work of the discharged employees was unsatisfactory and that this was the sole reason for the discharges. Much of this testimony, of course, was from management, but like testimony was given by other employees and, it may be said, by the testimony in some

instances of the discharged employees with respect to their own work. The first of the four employees to be discharged was Lucille Yancey whose employment was terminated on December 4, 1957. We are informed by the Board's brief that she "joined the union about ten days before her discharge and immediately became very active in its affairs." Her activity consisted of her receiving several visits from union organizers and promising to give the union a list of employees' names. It is not shown that this promise was kept. She did no soliciting of members for the union. She testified, and reiterated her testimony, that no union meetings were held until after her discharge. Since a union meeting was, in fact, held on the day before she was discharged, her testimony indicates both a lack of knowledge of the activities of the union and a lack of interest in such activities. She attended two meetings after she was discharged. The Board, in its brief, tells us that Mrs. Yancey told Morris Scharff, on the day of her discharge or the following day, that she would "abandon her union activities if she could return to her job." What she said she told Scharff was that if he would give her back her job, "I won't vote for the union." At this interview Mrs. Yancey told Scharff that she had not been helping organize the plant. None of her superiors ever discussed the union with her while she was an employee. She quoted Scharff as telling her that he did not know whether she had signed a union card. It seems apparent that in the preparation of the Board's brief ardor has outrun accuracy.

Mrs. Yancey testified as to her skill as an operator and of the compliments she had received for her excellent work. The superintendent, I. S. Prosperman, the supervisor, Grace Higgins, and several of Respondents' employees testified otherwise. Of this

testimony, the Examiner and the Board discredited, for the most part, that which was favorable to the Respondents and credited that which was unfavorable to them. It was pretty clear, though, that Mrs. Yancey had considerable trouble in sewing in the linings of coats. The Examiner was persuaded that this was not due to any lack of ability on the part of Mrs. Yancey, but rather to the skimpy cut of the linings. Mrs. Yancey admitted making the request for the linings to be cut longer, but only for the purpose of making it easier on her. Proper and satisfactory garments, she said, were being made with the linings as furnished. There was evidence, credible and credited, that Mrs. Yancey's work was not in all respects satisfactory. Applicable here are the following principles:

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. *N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352. See *N.L.R.B.* v. *McGahey, supra.*

The Examiner has found that the Respondents knew or believed that Mrs. Yancey was a strong union adherent. The Board, in its brief, urges that "In view of respondents' demonstrated hostility to the union, and its surveillance of union activities, there was ample basis for the Board to find * * * that Yancey was known or believed by respondents to be an active union adherent, and that this was the rea-

son for her discharge." The difficulty with the Board's position is that the evidence which the Examiner has credited, as well as that which he has discredited, shows that Mrs. Yancey was not at all active in her union adherence and no evidence, whether or not credited, tends to show otherwise. The visits of union organizers to Mrs. Yancey's home do not support a finding of union activity on her part. Nor does the anti-union feeling of the Respondents so change the character of the evidence as to require or permit the inference of wrongful discharge which the Examiner and the Board draw. The opposition of an employer to union organization, and restraint, coercion and interference are not enough to make the discharge of an employee a wrongful one. *N.L.R.B.* v. *Hudson Pulp & Paper Corporation, supra; N.L.R.B.* v. *McGahey, supra.* Anti-union bias, while a factor in evaluating testimony, does not supply the element of purpose. That element must be established with respect to each discharge. *N.L.R.B.* v. *Dan River Mills, Inc., supra.* The finding that Mrs. Yancey was discharged because of union activity was, it appears, based upon suspicion and conjecture. Such a finding, so based, cannot be sustained. *N.L.R.B.* v. *Drennon Food Products Co.,* 5th Cir. 1959, 272 2d 23; *N.L.R.B.* v. *Cosco Products Co., supra.* We have the firm conviction that there is not substantial evidence on the record as a whole that the discharge of Mrs. Yancey was wrongful.

We reach the same conclusion with respect to Grace McCart, Pearl Coker and Ruth Brooks as in the case of Mrs. Yancey. As to Mrs. McCart the evidence shows she attended a union meeting. There is no other evidence of union activity on her part. There was evidence of poor workmanship on her part. The conclusion is reached that because Morris Scharff was quoted as threatening to fire known union adherents,

and because Scharff had asked her who attended the meeting, the discharge was the result of union activity. There was no firing of all union adherents, and the discussion between Mrs. McCart and Morris Scharff was initiated by her. She asserted that she was discharged because of union membership, a self-serving opinion which the Examiner and the Board accepted as fact. The Examiner stressed the fact that Mrs. McCart was rehired about a year later and then did satisfactory work, and from this fact draws the inference that she must have been doing satisfactory work before. While the doing of satisfactory work after the rehiring may justify an inference of an ability to do good work before being discharged, it does not demonstrate that she had done good work before being discharged.

Of the same pattern as Mrs. McCart were the discharges of Pearl Coker and Ruth Brooks. As with Mrs. Yancey, the Board's counsel says that the Board's finding of unlawful discharge of Pearl Coker is justified "in view of respondent's unconcealed animosity toward the union." That she was a submarginal producer is shown by her own testimony. Like Mrs. McCart, Pearl Coker was later rehired and from this the inference is again drawn that the work of the discharged employee must have been previously satisfactory. In the case of Ruth Brooks, from her own testimony, it appeared that she was unable to make production and had told Morris Scharff that she was not satisfied with her operation. She quoted him as saying that he also was not satisfied. As in the case of Mrs. Yancey, we conclude that there is not substantial evidence on the record as a whole to sustain the findings that the discharges of Grace McCart, Pearl Coker and Ruth Brooks were wrongful.

On January 18, 1958, the union sent to the Respondents a letter listing twelve employees who were therein

said to be members of the union and serving on the organizing committee, and that these employees had "been fully advised of their rights under the National Labor Relations Act," and that they were "protected in their rights to join and assist the union by Sec. 8, A (3) of the National Labor Relations Act as amended." On January 24, 1958, there was a lay-off of a number of the Respondents' employees. The lay-off resulted from a decline in business which necessitated a cutback in production. Included among those who were laid off were nine of those listed in the letter of the union to the Respondents. The Examiner and the Board found that the nine had been laid off because of their union activity. Those in charge of the Respondents' management testified as to the method used in the selection of those who were to be laid off. This testimony was plausible and, on the whole, consistent. It was largely uncontradicted. It would not have been found, we think, that the General Counsel had sustained the burden of proof as to discrimination but for the letter of the union and the fact that Morris Scharff had asked those who were named if the use of their names had been authorized.

It may be that in the absence of the letter from the union, the Respondents would have been guilty of interference if they had questioned employees regarding their union membership and activities, although this is not certain and is not before us for decision. Where, however, the union has notified the employer of the activity for the union of certain of the employees, no interference results from an inquiry as to the correctness of the union statement. Cf. *N.L.R.B.* v. *Montgomery Ward & Co.*, 2nd Cir. 1951, 192 F 2d 160; *Sax* v. *N.L.R.B.*, 7th Cir. 1948, 171 F. 2d 769. It is well settled that an employee may not be dis-

charged because of union activity. It is also true that union membership and union activity do not insulate an employee from being discharged where an unlawful motive has not been shown. *N.L.R.B.* v. *Ingram, supra; N.L.R.B.* v. *Hudson Pulp & Paper Corporation, supra; N.L.R.B.* v. *Raymond Pearson, Inc.,* 5th Cir. 1957, 243 F. 2d 456; *N.L.R.B.* v. *Newton Company, supra; N.L.R.B.* v. *Huber & Huber Motor Express,* 5th Cir. 1955, 223 F. 2d 748; *N.L.R.B.* v. *Williamson-Dickie Mfg. Co.,* 5th Cir. 1942, 130 F. 2d 260; *N.L.R.B.* v. *Tex-O-Kan Mills Co., supra.*

Evidence is admissible in a proceeding to determine whether or not there has been anti-union discrimination in a lay-off of the percentage of union adherents involved. *N.L.R.B.* v. *Newton Co., supra, N.L.R.B.* v. *Nabors,* 5th Cir. 1952, 196 F. 2d 272, cert. den. 344 U.S. 865, 73 S. Ct. 106, 97 L. Ed. 671. There is no finding as to the percentage of union adherents retained or laid off. There is no finding as to the extent of the activity for union organization of union members laid off as compared with those retained. There is a finding that nine were laid off out of the twelve designated by the union in its caveat served upon the company. The fact that the Respondents disregarded the obvious effort of the union to prevent the discharge of those designated by it is of little weight in drawing an inference of a discriminatory discharge.

The selection of the employees to be laid off had been determined before the union's warning had been delivered, if the witnesses for the Respondents are to be believed. They were not believed by the Examiner or the Board. The Respondents' management assigned plausible and reasonable grounds for the selection of each of those who were laid off. The factual basis for the selections as given by the Respondents'

witnesses were largely uncontradicted. The Examiner, however, and the Board, rejected the reasons asserted by the Respondents and found the motive for the selection of the nine committeemen was their union membership. In so doing, the Board placed its own evaluations upon the factual situations, assumed managerial prerogatives, and reached the conclusions that good business judgment would not have justified the Respondents in their selections for lay-offs and therefore, says the Board, the motive was the unlawful one.

In the frequently quoted opinion of *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co., supra,* it was said:

> In each such case such membership may have been the cause [of discharge or lay-off], for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn testimony on the exact point. 122 F. 2d 433, 438–439. See *N.L.R.B.* v. *Cosco Products Co., supra.*

The Board has, in this case, been so obsessed with and fixed upon the anti-union attitude of the Respondents that it has rejected all other considerations for the questioned discharges and lay-offs. It is appropriate to say here, as was said in the McGahey case:

> But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. *N.L.R.B.* v. *McGahey, supra.*

We reached the conclusion that the Board's General Counsel has failed to carry the burden of showing by substantial evidence on the record as a whole that the lay-offs were discriminatory, and therefore the portion of the Board's order directing reinstatement of the specified nine employees who were laid off will not be enforced.

The petition for enforcement will be granted in part, modified as herein provided, and denied in part.

Enforced in part; denied in part.

JUDGMENT

Extract from the Minutes of January 6, 1961

NATIONAL LABOR RELATIONS BOARD, *versus* WALTON MANUFACTURING COMPANY AND LOGANVILLE PANTS COMPANY

No. 18198

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on October 21, 1959, in the proceedings known upon the records of the Board as Case Nos. 10–CA–3127, 3201, 3219, 3202 and 3218, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for enforcement in this cause be, and the same is hereby, granted in part and denied in part and modified in accordance with the opinion of this Court.

U. S. GOVERNMENT PRINTING OFFICE: 1961